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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1175

DELTA AIR LINES, INC.,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,

Respondent.

BRIEF OF McDONNELL DOUGLAS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondent McDonnell Douglas Corporation ("MDC") respectfully submits this Brief in opposition to the petition for writ of certiorari filed by petitioner Delta Air Lines, Inc. ("Delta"), and for the reasons stated herein urges this Honorable Court to deny Delta's petition.

STATEMENT OF THE CASE

Delta has not supplied the Court with a full and correct statement of the case. For this reason MDC is setting forth below its own statement of the case.

I. Pertinent Accident Facts Omitted From Delta's Petition.

In its petition Delta refrained from mentioning several pertinent facts concerning the accident in question.

First, at the non-jury trial held in the District Court with respect to the validity and applicability of the warranty article and exculpatory clause contained in the Aircraft Purchase Agreement, the parties agreed that the evidence indicated that the cause of the nose landing gear collapse was an incorrectly installed component part of the nose landing gear assembly. 350 F.Supp. 739.[1] Therefore, the type of alleged "defect" in question is one of the "defects in workmanship" expressly mentioned in the warranty article, and with respect to which the warranty article expressly provides certain remedies and limitations. (The warranty article is attached as Appendix A.)

In other words, in negotiating the Aircraft Purchase Agreement the parties specifically agreed on the rights and remedies and liabilities of each party in the event of a defect such as the one involved here.

Second, there were no personal injuries of any type in the incident in question, and contrary to Delta's innuendoes the rights of innocent passengers or the public at large are in no way involved in this case and will not be affected in the least by the outcome of this case.

Third, MDC did not contend and does not now contend that the warranty article and exculpatory clause

[1] Each party accuses the other of installing the part incorrectly. Alternatively, MDC says that Delta should have discovered the incorrect installation prior to the accident.

insulate MDC from passenger claims or any other claims asserted by the public at large.

To the contrary, it has been the law of the land for years that passengers and other members of the public at large "are not parties to the contract and their rights would not be compromised. They retain their rights to bring a direct action against Douglas. . . ." *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc.*, 231 Cal.App.2d 95, 47 Cal.Rptr. 518 (1965). (Copy of this decision is attached as Appendix B for convenient reference.)

Moreover, the aircraft purchase agreement does not require Delta to indemnify MDC for passenger claims filed because of MDC's negligence.

This case therefore simply does not involve the "public interest" repeatedly referred to by Delta in its petition.

Fourth, contrary to Delta's statements in its petition, MDC does not contend that Delta has no remedy for any alleged wrongdoing on MDC's part. MDC contends simply that any claim Delta may have is governed by the terms of the warranty article negotiated and agreed to by the parties.

Last, Delta has admitted that its damage claim against MDC is composed of the following items (R. 307, 593, 670):

Alleged Actual Repair Costs:		
Labor	$14,257.68	
Overhead (150% of Labor)	21,386.52	
Expense Statements	292.61	
Car Rental	67.42	
Photographs	482.56	
Parts and Materials	28,577.53	$65,064.32
Alleged Additional Estimated Repair Costs on Nose Gear:		
Parts, Materials and Supplies	$14,778.00	
Labor—400 hours at $4.38	1,752.00	
Overhead	2,628.00	
Contingent Additional Costs of $30,000 if Nose Gear Side Braces, Piston, Drag Links and Retract Strut are Damaged Beyond Repair	30,000.00	$49,158.00
Alleged Ferry Flights (Ferry Damaged DC-8 to Atlanta from Jacksonville and Another DC-8 to Jacksonville to Replace Damaged Aircraft):		1,622.00
Alleged Loss of Use:		87,500.00
TOTAL ALLEGED DAMAGES;		$203,344.32

From even a casual perusal of Delta's itemization of alleged damages it is obvious that Delta is not making and has never made a legitimate claim *under* the terms of the warranty article. To the contrary, Delta has asserted a claim for damages *outside* the warranty article.

II. The Contract Documents.

Examination of all of the relevant contract documents is helpful in arriving at an understanding of the basic issues involved in this case.

The Purchase Agreement in question was entered into at Long Beach, California on November 18, 1964 and in its original form related only to the so-called "short" DC-8 aircraft, or Series 51 DC-8 aircraft. (R. 64) On August 13, 1966, in Long Beach, California, the parties executed Amendment No. 5 to the Purchase Agreement, which amendment provided that additional DC-8 aircraft, of the Series 61 or "stretched" variety, would be delivered to Delta under the terms and provisions of the November 18, 1964 Purchase Agreement. The accident aircraft was one of the aircraft covered in Amendment No. 5. (R. 109) The basic Purchase Agreement, exclusive of the numerous exhibits, change orders, amendments and side letter agreements, totaled 44 pages in length, and the basic price of the accident aircraft, excluding extra and other charges, was $8,479,833.00. (R. 112)

Articles 2 and 7 and Exhibit "A" of the Purchase Agreement provided that manufacture of the aircraft would be according to detailed specifications submitted by Delta. (R. 68, 82) In effect, the accident aircraft was to be tailored to Delta's particular needs and require-

ments, as outlined to MDC by Delta. Delta was given in Article 3 of the Purchase Agreement the right to inspect any part of the manufacturing process and any part of the aircraft itself during the manufacturing process. Article 3 of the Purchase Agreement also gave Delta the right to participate as an observer in MDC's own flight testing of the aircraft, and Article 3 specifically required Delta to technically approve the aircraft prior to actual delivery. Article 4 placed on MDC the risk of any loss or damage to the aircraft prior to actual delivery to Delta. (R. 69-75)

The Purchase Agreement also provided in Articles 13 and 14 that MDC would hold Delta harmless from patent infringement or other similar claims. (R. 99) Reciprocal hold harmless agreements were included in Article 3 of the Purchase Agreement (R. 69) with respect to liabilities that might be incurred during flight testing.

Article 4 provided that manufacture and delivery of the aircraft would take place in California, and Article 17 provided: "This agreement shall be construed and performance thereof shall be determined according to the laws of the State of California, U.S.A." And "entire contract," "parol evidence" and "merger" clauses were contained in Article 17 of the Purchase Agreement. (R. 74, 106)

It is pertinent to this case that in Paragraph No. 8 of Amendment No. 5 of the Purchase Agreement, the parties on August 13, 1966 expressly agreed:

> "By the execution hereof *the parties hereto agree that all of the terms of the purchase agreement shall remain in full force and effect* except as herein expressly changed, modified or supplemented, or

> except insofar as the terms have been completed, performed, or complied with prior to the date hereof." (Emphasis added.) (R. 118)

Amendment No. 5 in no way "changed, modified or supplemented" the Warranty Article, exculpatory clause and limitations of liability contained in the Purchase Agreement, and in executing Amendment No. 5 on August 13, 1966, the parties expressly stipulated and agreed that the Warranty Article, including the exculpatory clause and limitation of liabilities, would "remain in full force and effect."

Pursuant to the provisions of Amendment No. 5 of the Purchase Agreement, Delta exercised an option to lease the accident aircraft for the first twelve (12) months after delivery, or from January, 1969 to January, 1970. Of particular importance to the issues involved in this litigation is the fact that in Paragraph 29 of the Lease Agreement Delta and MDC specifically agreed (on January 16, 1969):

> "*This lease agreement does not modify or render ineffective or inapplicable any provisions of purchase agreement* DAC 64-110-D, as amended, and its other exhibits, *including specifically Article 12 [the warranty article] of the purchase agreement,* except as specifically provided herein." (R. 136)

Thus, as late as January 16, 1969, Delta and MDC re-affirmed their intent to be bound by the provisions of the Warranty Article contained in the original Purchase Agreement, including the exculpatory clause and limitations of liability.

Delivery of the accident aircraft to Delta by MDC took place on January 16, 1969 at Long Beach, California and is evidenced by a "Packing Sheet" signed

by MDC and Delta in California on that date. (R. 146) In signing the Packing Sheet and in accepting delivery of the aircraft, Delta expressed its technical approval of the aircraft and re-affirmed its contractual commitment and intent to be bound by the terms and provisions of the Warranty Article in the Purchase Agreement, in the event of a defect in the aircraft. To be precise, the Packing Sheet signed by Delta on January 16, 1969 contained the following express agreement:

> "Delta hereby technically approves this aircraft *and waives all remedies as to the condition thereof,* including the remedy of rejection after delivery, *excepting only those remedies provided for in the article of the above described purchase agreement entitled 'Warranty'* and those items under attachments A and B to this packing sheet *and agrees that said aircraft otherwise has been manufactured in accordance with and physically conforms to the requirements of said purchase agreement,* as so amended, *and the detailed specification* DS-3016 as defined therein. . . . Receipt of the above identified aircraft is hereby also acknowledged." (R. 146)

From the foregoing it is obvious that the contract documents in question were not "boilerplate" forms, but were complex agreements which attempted to spell out *all* of the rights and duties of the parties and which contained detailed provisions specially tailored to fit the individual needs and requirements of both parties to the bargain.

III. Delta's Position As A Contracting Party.

It is important to consider in some detail Delta's strength and bargaining power and position (a) at the time the original contract was entered into (November 18, 1964), (b) at the time Amendment No. 5 adding

the accident aircraft was entered into (August 13, 1966 —at which time Delta re-affirmed its commitment to be bound by the provisions of the Warranty Article) and (c) at the time the Lease Agreement and Packing Sheet were executed (January 16, 1969—at which time Delta twice re-affirmed its intention to be bound by the provisions of the Warranty Article).

Mr. Jack Hall, former Chief Counsel of Douglas Aircraft Company (now a division of MDC), and other witnesses testified at trial that during the period of time in question Delta was a major airline and major customer of MDC, and that Delta bought a lot of equipment from MDC. The evidence also shows that Delta was a valuable and important customer of MDC, and one that MDC wanted to keep satisfied as much as it could. (R. 942)

MDC's Director of Commercial Contracts Administration testified that during the years in question four-engine commercial jets other than the DC-8 were available from competitors of MDC. The Boeing 707 and Convair 880 aircraft were given as examples, and it was pointed out that MDC lost some DC-8 sales to airlines (including Delta) that purchased Convair 880's, Boeing 707's and other four-engine jets manufactured by MDC's competitors. (Vening Depos., pp. 34-36)

Delta's Vice-President admitted that Delta was the only major airline that did not operate Boeing 727 (three engine) and 707 (four engine) jet aircraft and other types of large jet aircraft; that most other major airlines (TWA, Braniff, Pan Am, Eastern, National, American, etc.) operated three and four-engine jets manufactured by competitors of MDC; that many of Delta's major competitors did not operate the "stretched"

DC-8 in domestic service; and that many of Delta's major competitors operated jets manufactured by competitors of MDC along routes identical with Delta's routes, in direct competition with Delta. (R. 1045-1060) He also stated that Delta considered the large three and four-engine jets manufactured by MDC's competitors to be safe aircraft, and that it would be possible (but perhaps not as profitable) for Delta to operate along its route system with the large three and four-engine jets that were available from MDC's competitors. (R. 1049)

Delta's Annual Reports for the years 1963-1969 are in evidence and reveal that based on the accepted yardstick of revenue passenger miles Delta was the seventh largest airline in the world in 1963. (R. 374) In 1966 Delta was the fifth largest commercial airline in the United States. (R. 439) And in 1965 Delta boarded 1,000,000 passengers more than its nearest competitor. (R. 414) Also, Delta's witnesses testified that Delta had shown profits for thirty years. (R. 1046, 1065)

Although Delta was the first commercial airline to put the DC-8 four-engine jet manufactured by MDC into commercial service, Delta was also the first airline to operate in commercial service the Convair 880 four-engine jet, manufactured by a competitor of MDC. In this regard, it should be noted that Delta purchased from a competitor of MDC at least 16 Convair 880 four-engine jet aircraft under purchase contracts *that did not contain exculpatory or limitation of liability clauses relieving the manufacturer from liability to Delta for the manufacturer's own negligence.* (R. 1000) And in 1963 and 1964 Delta actually operated more Convair 880 four-engine jets than DC-8 four-engine jets manu-

factured by MDC. It was not until 1965 that Delta operated as many DC-8 four-engine jets as Convair 880 four-engine jets. (R. 423)

This evidence establishes that genuine competition existed among the manufacturers of large three and four-engine jets during the period of time in question, that Delta occupied an important and strong position in the field of commercial aviation, that Delta was by no means an economic weakling, that large passenger-carrying jets other than the "stretched" DC-8 were available to Delta and could have been purchased by Delta,[2] and that Delta was under no "compulsion" to purchase the aircraft in question.

IV. The History Of The Contract Negotiations.

In its petition Delta carefully made no mention at all of the negotiations that culminated in the contract, warranty article and exculpatory clause in question. A review of such negotiations is essential to proper determination of this case.

With respect to the manner in which MDC aircraft purchase agreements in general are negotiated, the Branch Manager of Commercial Contracts for MDC explained:

> "A. . . . you have got to look a little bit at how a purchase agreement is negotiated. Normally the sales department approaches a customer and there —there is quite a bit of negotiation—I think you could call it back and forth—before any document is really—purchase agreement is written. Once certain parameters, I guess you would call them, have been established, we are requested to pre-

[2] Under purchase agreements that did not exculpate the seller from liability for negligent manufacture.

pare a draft of an agreement as a part of a total proposal for any given number of aircraft. This is normally where we [the MDC contract department] get into the picture. From that point on, we are generally a part of the negotiations, and once the terms of any given agreement are settled and arrived at, it's our responsibility to get them on paper, and we normally present them to the customer, although this is not a hard and fast rule either, if somebody like a vice president of sales may take the final draft of a purchase agreement to the customer, and I think what I am trying to say is that *the negotiation may go across several levels of authority and responsibility in both companies.*" (Maas Depos., pp. 20-21)

The MDC Manager of Commercial Contracts testified that all aircraft purchase agreements are unusual and that none of them are identical. He also explained that the purchase of commercial aircraft such as the one involved in this case was the subject of much negotiation and that most generally both the buyer and the seller employed negotiating teams composed of representatives from their respective contract, legal, sales and engineering departments. (Zimmerman Depos., p. 15)

He further testified that MDC developed a form of a purchase agreement that was presented to potential customers as a basis for kicking off negotiations concerning the purchase of aircraft, but that such initial form of agreement was modified greatly through negotiations between the various teams representing the buyer and seller. (Zimmerman Depos., pp. 10 and 24) The following testimony is most illustrative of the negotiating process:

"Q. . . . Mr. Zimmerman, the phrase 'contract negotiations,' and the phrase 'negotiating contracts and negotiators,' and 'negotiating team' has been

mentioned during your examination. Would you explain for the Court and possibly the jury what contract negotiations are with respect to purchase of aircraft, and is it like buying a pair of shoes from a department store? Is it that type of negotiation?

"A. No.

"Q. Well would you just explain it fully?

"A. Each negotiation is unique in that there is an offering of an airplane at a related price to a specification with an assigned delivery schedule. Basically that's what sells the airplane, coupled, of course, with the technical studies it gives with it, the seat amount cost and those kinds of engineering studies, performance. The customer or potential buyer is then convinced that this fulfills a capacity for him or requirement for him. He enters into negotiations for the then related terms and conditions for the contract, the so-called what we might say as boiler plate, if there could be such a term, and basically what you do, you present him with a contract consisting of standard terms and conditions, as standard as you can have them, and the basis upon which you negotiate, *and you start from the front of the contract, and it is a back and forth trade-off type of consideration that takes place in terms of time, anywhere from a few days to several weeks.*

"Q. *And sometimes during these negotiations are these so-called standard provisions changed, deleted, modified, or revised?*

"A. *They are sometimes all three, modified, changed and revised.*

"Q. *Would that include also the warranty article and the exculpatory clause that has been mentioned?*

"A. *They have been revised.* They have been talked about many times.

"Q. In the discussions with carriers?

"A. In the discussions with carriers."
(Zimmerman Depos., pp. 23-24) (Emphasis added)

MDC's Director of Commercial Contracts Administration pointed out that Delta's Legal Department assisted Delta in negotiating aircraft purchase agreements:

"Q. What type of personnel would compose the negotiating team for an airline?

"A. Top management. Sometimes they bring their lawyers and sometimes they don't bring their lawyers." (Vening Depos., p. 29)

This evidence confirms that aircraft purchase agreements, including the one at issue here, are the subject of much negotiation and that the negotiating teams are composed of high-level representatives from the various departments of each company.

Turning now to the negotiations concerning the warranty article and exculpatory clause in question, the testimony adduced at the special non-jury trial establishes that the limitations of liability and exculpatory clause in the Warranty Article were related to MDC's product liability insurance coverage and played an important role in determining the total purchase price of DC-8 aircraft. Inclusion of the clauses in the Purchase Agreement created an economic limit on the amount of MDC's hull loss liability exposure, thereby resulting in reduced product liability insurance premiums, which reduction in insurance costs was passed on to the customer as a lessening in the aircraft purchase price. Conversely, if the clauses were deleted from a purchase agreement through negotiations, the purchase price of the aircraft had to be increased suffi-

ciently to compensate for the additional product liability insurance expense factor involved in the overhead of producing the aircraft. (R. 946-968)

Several MDC witnesses testified that during contract negotiations MDC advised prospective customers of the relationship among the exculpatory clause and limitations of liability on the one hand and MDC's liability insurance costs and aircraft overhead costs on the other hand. (R. 951, 1021) Delta witnesses admitted that during negotiations on the Warranty Article in question Delta was advised of the manner in which the exculpatory clause and limitations of liability affect MDC's insurance program and the overall costs or overhead involved in producing DC-8 aircraft. (R. 1006, 1079)

MDC also presented positive evidence that the clauses in question were open to negotiation and that through negotiation the clauses were sometimes omitted from purchase agreements, provided the customer paid the increased overhead cost incurred by MDC having to purchase additional product liability insurance.

For example, Mr. Vening of MDC testified that in a DC-9 contract signed *four months prior* to the purchase agreement in question TWA and MDC agreed to delete the exculpatory clause in exchange for a $7,724.00 increase in the aircraft purchase price to offset the increased overhead. (Vening Depos., pp. 13-23)

And Mr. John Carroll of MDC testified that during negotiations with TWA and American Airlines on DC-10 aircraft MDC agreed to delete the exculpatory clause in exchange for a $15,000.00 per aircraft price increase to offset the increased overhead cost incurred

by purchasing additional product liability insurance. (R. 1024, 1037-38) [For reasons not relevant here TWA ultimately decided not to purchase DC-10 aircraft. American Airlines did purchase DC-10 aircraft without the exculpatory clause, but instead of increasing the aircraft purchase price MDC and American apparently "traded off" on other contract provisions, to the benefit of MDC. (R. 1042-43)] In the Trial Court Delta complained that MDC never offered a specific price for the deletion of the exculpatory clause, but MDC witnesses explained (and Delta witnesses admitted) that Delta never asked MDC for a specific price or cost figure for the deletion. (R. 1080) To compute the cost for the deletion, MDC would have to consult with its insurance underwriters and brokers. (R. 1021-22) And Delta witnesses admitted that MDC was never asked to consult with its insurance underwriters regarding the cost of deletion. (R. 1080) *In fact, Delta's Senior Vice President-Legal testified at trial that Delta wanted the clauses deleted "for nothing" or for free.* (R. 1081)

The evidence also establishes that Delta had full knowledge of the import and meaning of the Warranty Article and limitations of liability and exculpatory clause prior to entering into the Purchase Agreement in question. For example, in February, 1963, MDC's legal department wrote to Delta's legal department and explained the significance of the exculpatory clause. (R. 1040) Moreover, prior to entering into the Purchase Agreement in question Delta was involved in litigation with MDC concerning the validity and scope of an exculpatory clause and limitations of liability identical with the ones involved here. See *Delta v. Douglas Aircraft Company, supra.* This case was tried in September,

1963,—more than a year *prior* to execution of the Purchase Agreement in question here,—and the decision of the California Court of Appeals was handed down on November 9, 1965,—almost a full year *prior* to execution of Amendment No. 5 to the Purchase Agreement (adding the accident aircraft).

Based on the foregoing evidence and other evidence in the Record, it is clear that the contract terms in issue *were legitimately related to the overall cost of DC-8* aircraft, that the terms were open to negotiation, and that Delta was not "compelled" to accept or agree to such terms.

In effect, the sole question confronting the parties during the negotiations on the warranty article was an economic one: which party will bear the risk of certain types of economic loss occasioned by aircraft damage resulting from a defect in the aircraft? Delta chose to shoulder part of this economic risk in exchange for the specific warranty obligations imposed upon MDC in the warranty article and also in exchange for an aircraft purchase price that reflected a credit because of MDC's decreased product liability exposure. Such an agreement concerning economic loss risk shifting does not, contrary to Delta's suggestions, violate any "public policy" or increase the risk of aircraft accidents or encourage "careless" manufacture of aircraft.

REASONS FOR DENYING DELTA'S PETITION

I. Federal Aviation Regulations and Aviation Safety Are Not Affected By The Warranty Article and Exculpatory Clause.

As its first reason for the grant of writ of certiorari, and generally throughout its petition, Delta argues that

any effort to require it to honor and abide by its own solemn contractual commitments will in some way "undermine" Federal Aviation Regulations and aviation safety.

This argument is both absurd and totally unsupported by *any* evidence.

Neither the exculpatory clause, the warranty article nor any other provision of the aircraft purchase agreement even purports to "exempt" or relieve MDC from responsibility or liability to the F.A.A. or any other governmental agency for a violation of F.A.A. regulations or for any other "violation of law" or negligence. The F.A.A. and other governmental agencies are not prohibited by the exculpatory clause from imposing either civil or criminal penalties upon MDC for a "violation of law". In short, the F.A.A. and the Federal Aviation Regulations are not the least bit affected by the contract between Delta and MDC.

It must also be conceded that the exculpatory clause does not exempt or relieve MDC from responsibility or liability to passengers or other private third parties for a violation of F.A.A. regulations or for any other "violation of law" or negligence. As held in the earlier *Delta v. Douglas* case, *supra:*

> "The upholding of the exculpatory clause will not adversely affect rights of future passengers. They are not parties to the contract and their rights would not be compromised. They retain their right to bring a direct action against Douglas for negligence."

Moreover, the aircraft purchase agreement does not require Delta to indemnify or hold harmless MDC from any claims by passengers or other third parties.

Inasmuch as MDC admittedly has civil and criminal liability and responsibility both to the F.A.A. and to private third parties (*i.e.* the public at large) for any "violation of law" or negligence, the interest of the government and the public in aviation safety is in no way "undermined" or affected adversely by the Delta-MDC contract.

We turn now to the point we consider to be most important—namely, *the exculpatory clause does not exempt MDC from liability to Delta for a violation of law or for negligence.*

The exculpatory clause simply does not say that if MDC is negligent or violates the law Delta has no remedy.

Nor does the exculpatory clause say that MDC has no liability or responsibility whatsoever to Delta for a violation of law or for negligence.

Instead, the exculpatory clause plainly says:

> "(G) The warranty provided in this article *and the obligations and liabilities of Seller thereunder* are in lieu of and Buyer hereby waives all other . . . liabilities . . ."

This language simply does not constitute an "exemption" of liability for violation of law.

To the contrary, the above-quoted language clearly indicates that in the event of negligence or a "violation of law", *MDC has specific responsibilities and liabilities to Delta under the express terms of the warranty article.*

In short, the exculpatory clause in reality is neither a true "exculpatory" clause nor a true "risk-shifting" or "disclaimer" clause. *It is a risk-fixing clause, whereby Delta and MDC agreed in advance upon Delta's rights and*

MDC's obligations, responsibilities and liabilities in the event of a "violation of law" or other deficiency in performance on the part of MDC.

And the terms of this private risk-fixing agreement were voluntarily negotiated and agreed to by Delta in exchange (a) for an aircraft purchase price favorable to Delta, and (b) for the express written warranty obligations imposed on MDC.

These were not illusory or insubstantial considerations for either party.

For example, in a DC-9 contract signed four months before execution of the contract in question here, TWA and MDC agreed to delete the exculpatory clause, but the price of *each aircraft* was increased $7,724.00 to offset the increased overhead incurred by MDC having to purchase additional product liability insurance. (Vening depos. pp. 13-23).

And with respect to the substantial nature of the warranty obligations imposed upon MDC in the event of a "violation of law," we point out that MDC has already expended $2,141,000.00 on Delta DC-8 claims alone under the warranty article (exclusive of MDC's overhead and warranty administration expenses). (R. 1036)

Thus, insofar as the F.A.A., the public and even Delta are concerned, the object of the exculpatory clause is *not* to "exempt" or excuse MDC from liability or responsibility for a violation of law. To the contrary, the exculpatory clause serves only *to fix* MDC's obligations and liabilities *to Delta* (and not to anyone else) in the event of a violation of law.

Such a purely private risk-fixing agreement between two competent and equal bargainers does not violate the laws or policies of any state or of the United States Government.

As held in *Tunkl v. Regents of the University of California*, 32 Cal.Rptr. 33, 383 P.2d 441, 446 (1963):

> ". . . obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party."

See also *Stephens v. Southern Pacific Co.*, 190 Cal. 86, 88, 41 P. 783, 784 (1895).

This Honorable Court is also referred to the holdings of the earlier *Delta v. Douglas* case, *supra:*

> "If the language used be broad enough, an actor may disclaim liability for negligence of any type. We cannot see, in the language herein involved and above quoted, anything to limit the obvious breadth of the word 'negligence' . . .
>
> * * *
>
> "As we have pointed out above, the elements of an adhesive contract and of inequality of bargaining are here absent. Nor, although it is true that the manufacture and operation of aircraft is a matter of federal regulation, do we here have the kind of 'public interest' to which the above quotation [from another case] refers . . .
>
> * * *
>
> ". . . The fact that Delta is a regulated enterprise and carries passengers has no relevance to the present decision . . .
>
> * * *

> "In short, all that is herein involved is the question of which of two equal bargainers should bear the risk of economic loss if the product sold proved to be defective. Under the contract before us, Delta (or its insurance carrier if any) bears that risk in return for a purchase price acceptable to it; had the clause been removed, the risk would have fallen on Douglas (or its insurance carrier if any), but in return for an increased price deemed adequate by it to compensate for the risk assumed. We can see no reason why Delta, having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to Douglas, which had neither agreed to assume it nor been compensated for such assumption."

Thus, we see that Delta's suggestion that voiding of the contractual terms in question would somehow increase aviation safety is nothing more than a last-ditch emotional appeal totally unsupported by evidence.

It is absurd to imply that a company such as McDonnell Douglas Corporation, which is engaged in the manufacture and sale of all types of civil and military aircraft and equipment to major airlines, other private entities and the United States government, is anything less than acutely safety-minded.

And if MDC should need any impetus towards "safety-mindedness" (which it certainly does not), then such impetus is amply provided by MDC's obligations and liabilities to the F.A.A., by MDC's exposure to liability claims from the "public," *and by the severe financial penalties imposed upon MDC by the terms of the express warranties it has given to Delta, in the event of a warranty breach.*

Nothing further need be said about Delta's "public interest" and "safety" arguments.

II. The Decision Below Is Correct And Conforms To California Law.

As its second reason for grant of a writ of certiorari, Delta says that both the Courts below and the California Court of Appeals in the earlier *Delta v. Douglas* decision, *supra*, "refused to follow the law of California."

With respect to Delta's argument that in the earlier *Delta* case the California Court of Appeals "refused to follow the law of California," MDC believes the California Court of Appeals is in a better position than Delta is to interpret California law, and that the interpretations of California law made by the California Court of Appeals in the earlier litigation are more authoritative than Delta's not unbiased opinions.

MDC also believes that if the decision in the earlier case were erroneous, the California Court of Appeals would not have denied Delta's petition for rehearing and the California Supreme Court would not have denied Delta's petition for certiorari in that case.

It is also worth noting that the scope and breadth of the earlier *Delta v. Douglas* decision has never been retreated from or in any way modified or distinguished by California courts, and that the earlier decision is today what it was in 1965,—*the law of California*.

The earlier *Delta v. Douglas* decision is a comprehensive and exhaustive judicial study of a warranty article and exculpatory clause substantially identical with the warranty article and exculpatory clause involved in the case at bar. And the material facts of the earlier case are identical in all respects with the material facts of this case. The conclusion is inescapable, therefore, that

the earlier case is a binding precedent and that the warranty article and exculpatory clause involved in this case are valid and enforceable.

Delta's argument that the Courts below refused to follow California law is based on Delta's premise that since it is alleged MDC violated a Federal Aviation Regulation (14 C.F.R. § 21.165) which required MDC to "determine that each aircraft submitted for an airworthiness certification . . . is in a condition for safe flight," the proper application of California Civil Code § 1668 requires a ruling that the exculpatory clause is void as being in violation of "public policy."

In connection with this premise Delta incorrectly characterizes the California statute as rendering void any contract which relieves a party from liability for violation of law. Delta then repeats the error by saying that the contract in question here relieves MDC of any liability for violation of law.

MDC wishes to set the record straight.

First, the California statute in question declares void only those contracts which have as their "*object*" the "exemption" of a person from responsibility or liability for "violation of law."

And second, the contractual agreements involved here plainly do not have as their "object" the "exemption" of MDC from either responsibility or liability for "violation of law." If MDC should "violate the law" or commit a negligent act, MDC would face both criminal and civil liability and responsibility to the F.A.A., liability and responsibility to respond in damages to any injured passenger or member of the public, and, most important, *liability to Delta according to the terms*

of the warranty article voluntarily negotiated and agreed to by the parties.

Clearly, therefore, California Civil Code § 1668 is not applicable here.

A review of California decisions confirms that California Civil Code § 1668 is not relevant here, and that the District Court and Circuit Court decisions below correctly conform to the law of California.

With respect to California's public policy concerning exculpatory clauses or contractual limitations of liability, attention is called to the ruling of the California Supreme Court in a case Delta attempts to rely upon, —*Tunkl v. The Regents of the University of California*, 60 Cal.2d 92, 383 P.2d 441, 446 (1963):

> ". . . no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party. . . ."

Likewise, in *Artukovich v. Pacific States Coast Iron Pipe Co.*, 78 Cal.App. 1, 176 P.2d 962, 965 (1946), the California Court of Appeals said:

> "In California parties may agree by their contract to the limitation of liability in the event of a breach."

And in *Hischemoeller v. National Ice and Cold Storage Company of California*, 46 Cal.2d 318, 294 P.2d 433 (1956), the California Supreme Court upheld a limitation of liability provision with this ruling:

> "The facts in the present case disclose an ordinary business transaction between businessmen. There is no suggestion of short dealings or unfair practices on either side. Plaintiff bought what he

> paid for, and paid for what he bought. There appears to be no good reason for denying defendant the benefit of the limitation of liabilities set forth in the contract." 294 P.2d 433.

The law of California in this regard is in keeping with the "majority rule" regarding risk-fixing and risk-shifting agreements in a commercial (as opposed to consumer) setting. See *Disclaimers of Warranty in Consumer Sales*, 77 Harv. L. Rev. 318, 837 (1963), where the author noted:

> "A thwarting of the policies behind warranty need not attend recognition of disclaimers *in the commercial world*. There the buyer may be just as able to absorb and administer the inevitable risks of the seller's operations . . . There is common recourse to insurance . . . Buyers may even dictate the design, and thus be in a position to prevent the losses to which they are exposed. They are more capable of protecting themselves by caution and testing, and their own manufacturing processes and quality control systems stand between the object and ultimate users or bystanders." (Emphasis added.)

Georgia law on this subject is identical with the law of California. See *Andrews Motors Co. v. Clement*, 127 Ga.App. 745, 195 S.E.2d 249 (1972); *Rogers-Farmer Metro Chrysler-Plymouth, Inc. v. Barnett*, 125 Ga.App. 494, 188 S.E.2d 122 (1972); *Hawes v. Central of Georgia Ry.*, 117 Ga.App. 771, 162 S.E.2d 14 (1968); *Brown v. Five Points Parking Center*, 121 Ga.App. 819, 821, 175 S.E.2d 901 (1970); *Louisville & Nashville R.R. v. Atlantic Co.*, 66 Ga.App. 791, 797-805, 19 S.E.2d 364 (1942); *King v. Smith*, 47 Ga.App. 360, 364, 170 S.E. 546 (1933); and *Dowman-Dozier Mfg. Co. v. Central of Georgia Ry.*, 29 Ga.App. 187, 114 S.E. 815 (1922).

Cf., Ga. Code Ann. § 109A-2-719, which clearly authorizes contractual modifications or limitations of remedies, and *All-Co Drainage & Building Products, Inc. v. Umstead Enterprises, Inc.*, 123 Ga.App. 244, 180 S.E.2d 244 (1971), in which the Georgia Court of Appeals stated:

> "The UCC clearly contemplates that the method of computing a loss may be controlled by the agreement, in addition to *or in substitution of methods provided by statute.*"

(We do not mean to imply, however, that the UCC was in effect in California when Delta and MDC agreed upon the contractual terms in question here. See fn. 4 of the earlier *Delta v. Douglas* decision.)

For the reasons set forth above, Delta's allegations that "public policy" and California Civil Code § 1668 invalidate the exculpatory clause and limitations of liability contained in the aircraft purchase agreement are unfounded.

CONCLUSION

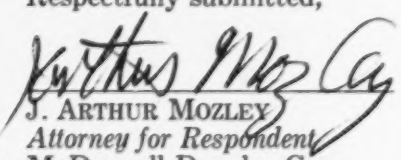
No statute, regulation or policy of the United States Government or of any state prohibits Delta and MDC from voluntarily agreeing—for a valuable consideration—to fix and limit between themselves only the risk of certain types of economic loss.

Delta's contention that the "negligence" portion of the exculpatory clause is violative of California public policy is answered succinctly by the decision in the earlier *Delta v. Douglas* case: "If the language used be broad enough, an actor may disclaim liability for negligence of any type." 238 Cal.App. 95, 101.

Consistent with the principles laid down by this Honorable Court in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1941), the Court below correctly ruled that the contractual agreements in question were valid and enforceable under California law.

Delta's petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, J. ARTHUR MOZLEY, attorney for respondent McDonnell Douglas Corporation and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 14th day of April, 1975, I served copies of the foregoing Brief upon all parties required to be served, by mailing three true copies of the foregoing Brief, correctly addressed and with the required postage prepaid, to the following attorneys of record for petitioner Delta Air Lines, Inc., in accordance with Supreme Court Rule 33:

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This 14th day of April, 1975.

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